in merit. It would serve no useful purpose to discuss them in detail. Suffice it to say that our consideration of the case has left us completely satisfied that the defendants had a fair trial. Indeed the trial judge, if anything, leaned over backward to afford them the fullest opportunity to establish their defense and he submitted their case to the jury in a charge to which no objection was or fairly could be made.

"The judgment of the district court will be affirmed."

A petition for writ of certiorari was filed subsequently in the Supreme Court of the United States on behalf of the defendants, and on May 17, 1948, the appeal for such writ was denied.

2390. Misbranding of Spectro-Chrome. U. S. v. 1 Device * * *. Decree of dismissal reversed upon appeal. Petition for certiorari denied by U. S. Supreme Court. Decree of condemnation and destruction. (F. D. C. No. 16781. Sample No. 4163–H.)

LIBEL FILED: July 26, 1945, District of Oregon.

ALLEGED SHIPMENT: On or about June 14, 1945, from Newfield, N. J., by Dinshah Spectro-Chrome Institute.

PRODUCT: 1 *Spectro-Chrome* device at Portland, Oreg., together with a number of pieces of printed and graphic matter which were shipped with the device and which were entitled "Spectro-Chrome Home Guide," "Favorscope for 1945," "Rational Food of Man," "Key to Radiant Health," "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer," "Spectro-Chrome General Advice Chart for the Service of Mankind—Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome—December 1941—Scarlet," and "Spectro-Chrome—March 1945—Yellow." The construction and appearance of the device was essentially the same as the device involved in the case which was reported in notices of judgment on drugs and devices, No. 2098.

NATURE OF CHARGE: Misbranding, Section 502 (a), the labeling of the device contained false and misleading curative and therapeutic claims in substantially the same respect as the device involved in the above-mentioned notice of judgment, No. 2098.

DISPOSITION: Following the seizure of the device, William Ray Olsen, Portland, Oreg., appeared as claimant and filed an answer on August 31, 1945, alleging that he was the owner of the device and that it had been unlawfully and forcibly seized and taken from his possession in his home, over his protests and against his consent. The claimant alleged also that the device was not subject to the jurisdiction of the court and that it was not misbranded. On February 20, 1946, a motion was made on behalf of the Government for an order directing that the colored slides of the device be detached and delivered to the Food and Drug Administration for the purpose of scientific examination. After consideration of the argument and briefs of counsel, the court, on April 4, 1946, handed down the following memorandum opinion:

MCCOLLOUCH, *District Judge:* "Because I was told that the Department of Justice was making this a test case for many similar cases throughout the country, I took some time before ruling, although it seemed plain to me at the outset that defendant's constitutional rights had been invaded.

"Defendant has purchased a Spectro-Chrome for the use of himself and his mother. The prospectus promises many cures. A color, or a combination of colors, will cure this, another combination of color will cure that. The Government obtained a judgment that the machine was fraudulent in proceedings against the manufacturer and, because this machine was shipped in interstate commerce, the Government claims the right to take it from defendant, though he has bought and paid for it and is using it in his home. In fact, the Marshal now has the machine in his possession, and this is a motion by the Government for permission to dismantle the machine for examination.

"On what conceivable basis, under our Constitutional guaranties can the Government deny to an adult individual the right to believe in and seek to cure himself of physical ailments by any means he chooses, so long as the means chosen is not inherently dangerous or harmful? I know many people who wear charms, including some who carry the lowly potato, to keep diseases away, and I had always thought they had the right to do this. Incidentally, I have no doubt that many get help in this manner.

"I have not mentioned the special guaranties afforded by our law against intrusion into the home. This ground, I feel confident, could be shown to be sufficient to denounce the seizure in this case as unlawful.

"Since writing what is above I have been advised that the Government is contemplating dismissing the case and returning the Spectro-Chrome to defendant's home. If that is done, it is likely that nothing more will need to be said.

"The Government's motion is denied."

On April 23, 1946, the claimant filed a motion to quash the warrant of seizure, to restore the seized device to the claimant, and to dismiss the libel proceedings. Arguments of counsel on the motion were heard by the court, and on April 29, 1946, an order was entered directing that the seized article of device be returned to the claimant. On May 21, 1946, the case came on for trial before the court without a jury, at which time the court denied the Government's motions for summary judgment and for an order for the production of the device in court. At the conclusion of the trial on May 22, 1946, the court rendered the following opinion:

McCOLLOUGH, *District Judge:* "This case having now been tried on the merits revives the question whether an inanimate object, inherently non-dangerous, which the owner thinks has therapeutic value, can be taken from him and his home, under process pursuant to the Federal Food and Drugs Act.

"It has been stipulated that the device was shipped in interstate commerce, labeled with false and misleading statements as to its therapeutic capabilities. Regardless, the owner testified that he was satisfied with the machine and wanted to keep it, and that he and his mother had both obtained help for certain disorders by using the machine. He testified further that he did not intend to make commercial use of the machine, did not intend to permit it to be used outside of his home, or by others than his immediate family, constituting his parents and two brothers, both over twenty-one years of age and having had the same education as Claimant, in the grammar and high schools of the city of Portland, Oregon. The Claimant is twenty-three years old and was employed during the war in aircraft production, where he made use of the education which he had received in technical high school.

"The Government relies on the words of the statute, that an article introduced into interstate commerce, with fraudulent representations as to its therapeutic value, may be seized and condemned 'while in interstate commerce or at any time thereafter. . . .' 21 U. S. C. Sec. 334 (a). The underlined words, the Government contends, permit it to pursue and seize the article and the literature containing the misleading statements, in a private home.

"As shown by an earlier memorandum, the article was seized by the Marshal on initial process, but I must now add that prior to the trial on the merits just concluded, and subsequent to the preliminary memorandum, I directed that the Spectro-Chrome be returned to Claimant's home—so that the case might present, as it now does, the clear cut issue, whether an instrument, harmless in itself, but accompanied by misleading literature as to the capabilities of the instrument, may be seized against his will from an adult male person, compos, who states that he is satisfied with the machine, is being helped by its use, and wishes to keep it.

"I think this issue has not before been directly presented and I think, as Judge Cooley said many years ago, that the question is—does this case constitute an exception to the general rule that the citizen's home is his castle, the security of which he may defend against all trespass? The Government has a heavy burden to establish the exception.

> Near in importance to exemption from any arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers against even the process of the law, except in a few specified cases. * * * [p. 425.]
> * * * it would generally be safe * * * to regard all those searches and seizures "unreasonable" which have hitherto been unknown to the law, and on that account to abstain from authorizing them, leaving parties and the public to the accustomed remedies. [p. 433.]
> [Constitutional Limitations, 7th Ed.]

"This case does not present such an exception. The case is nothing more than a well intentioned effort by high-minded and zealous officials to protect a man from what they deem to be folly, to the extent of following him into his home and family and there divesting him of property. This cannot be done, and I regret that I find myself in dissent from those Districts where, in con-

nection with the nation-wide campaign to retrieve Spectro-Chrome machines, wherever found, contempt orders have been issued to private owners to compel delivery for condemnation.

"To me, the wisdom of the ages means nothing if this humble citizen can be compelled against his will to yield access to his home to Federal officers to take from him and destroy a mechanical object, perfectly harmless in itself, which he thinks (whether rightly or wrongly makes no difference) is beneficial to him. My conception of the meaning of the Fourth Amendment is, that the citizen alone can unlock the doors to his dwelling, except in the rarest cases, and this is not one of the exceptions. Coke is credited with the maxim that 'An Englishman's home is his castle' (which is morticed into the Fourth Amendment of our National Bill of Rights), and I cannot resist adding the imperishable words by Chatham, of a later English generation:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

THE RIGHT TO PRESCRIBE FOR ONESELF

"Turning to the other major question in the case, no authority has been shown me that supports the position of the Government, which while admitting the Spectro-Chrome is not inherently dangerous, says in its brief: 'It is claimed to be indirectly dangerous because the ailment of the user is aggravated by reason of the failure to consult competent medical authority.'

"This is admirable frankness on the part of the Government, but, as stated, it is supported by no authority, and I venture that it can be supported by none. I hesitate to labor the point, in opposition to this claim of paternal right, to control the manner in which a person shall seek to cure himself. So many years, generations now, have been devoted to demonstrating that man is often his own best doctor, aside from the question of terrific import of personal liberty involved—it would be but stirring old waters, long calm, to review the successful struggle of healing groups and faiths, unconventional by majority standards.

"More, tremendously more, is here involved—the right of the individual to select his own manner and means of treatment. The question is not, whether false and misleading statements were made to Claimant. The question is, what does he want to do about it? He says 'Nothing,—I am satisfied. I am being helped.' But the Government answers 'We won't allow you to be satisfied. We won't allow you to help yourself. We know that you *may* be led into doing yourself harm, through relying too heavily on this machine, and thus not obtaining proper (by our standards) medical treatment.' Without intending to give offense, I think no such proposition of paternal right in the field of public health has been advanced in modern times. At least I have been unable to find it in encyclopedias, treatises, or law books.

CONCLUSION

"An easy way of disposing of this case would have been to hold that the attempt to stretch the Government's power of seizure and condemnation under the commerce clause to an article in the hands of the ultimate consumer, raised grave constitutional questions which forbade such construction (Federal Trade Commission v. American Tobacco Company, 264 U. S. 298), but I have preferred to meet head-on and to discuss the questions of security of one's dwelling and of personal liberty, which I regard as the true issues in the case. I have done this because I gained the impression during the war, and the impression has been strengthened since hostilities ended, that it is time for Federal judges to dust off the Constitution.

"Judgment will be for the Claimant."

Findings of facts and conclusions of law were filed in accordance with the foregoing opinion, and on August 1, 1946, judgment was entered dismissing the libel and confirming the return of the device and accompanying labeling to the claimant. A notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed on behalf of the Government on August 2, 1946, and on May 15, 1947, the following opinion was handed down by that court:

MATHEWS, *Circuit Judge:* "On a libel of information, appellant, the United States, proceeded against an article called a Spectro-Chrome found in possession

of appellee, William Ray Olsen, in the District of Oregon. Process was issued, and the article was seized. Appellee intervened as claimant of the article, answered the libel and obtained an order directing that the article be returned to him, and it was so returned. Thereafter a trial was had, findings of fact and conclusions of law were stated, and a decree was entered dismissing the libel.[2] From that decree this appeal is prosecuted.

"The proceeding was under § 304 of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. § 334, which provides:

(a) Any article of food, drug, device,[3] or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform as nearly as may be, to the procedure in admiralty; * * *

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may * * * direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; * * *

Section 502 of the Act, 21 U. S. C. A. § 352, provides:

A drug or device shall be deemed to be misbranded—

(a) If its labeling[4] is false or misleading in any particular.

"These facts are undisputed: The article in question—the so-called Spectro-Chrome—was an instrument, apparatus or contrivance intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man and hence was a device, within the meaning of the Act.[5] The article was transported in interstate commerce from Newfield, New Jersey, to Portland, Oregon, in June, 1945. When the article was introduced into and while it was in interstate commerce, its labeling[6] was false and misleading. Hence the article was misbranded, within the meaning of the Act,[7] when introduced into and while in interstate commerce.

"This proceeding was commenced on July 26, 1945. At that time, the article was not in interstate commerce. That, however, is immaterial; for, having been misbranded when introduced into and while in interstate commerce, the article was liable to be proceeded against and condemned at any time thereafter.[8]

"It is immaterial, if true, that appellee had purchased and paid for the article, had it in his home, was satisfied with it and desired to keep it; that the article was not inherently dangerous or harmful; that appellee did not intend to use it commercially or to permit its use by persons other than himself and his mother and brothers, all of whom were over 21 years of age; and that appellee believed that he and his mother had been benefited by its use. Such facts could not and did not exempt the article from the provisions of § 304 of the Act, 21 U. S. C. A. § 334.

"It is said that appellee has a right to prescribe for himself and to 'seek to cure himself of physical ailments by any means he chooses, so long as the means chosen is not inherently dangerous or harmful.'[9] Such a right, if it exists, is subordinate to the rights of appellant under § 304 of the Act, 21 U. S. C. A. § 334.

"There is no merit in the contention that § 304 of the Act, 21 U. S. C. A. § 334, is unconstitutional. The section is constitutional,[10] is applicable to this case

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[2] United States v. One Article of Device Labeled Spectro-Chrome, D. C. Or., 66 F. Supp. 754.

[3] Section 201 (h) of the Act, 21 U. S. C. A. § 321 (h), defines the term "device" as meaning "instruments, apparatus, and contrivances * * * intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals."

[4] Section 201 (m) of the Act, 21 U. S. C. A. § 321 (m), defines the term "labeling" as meaning "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

[5] See footnote 3.

[6] See footnote 4.

[7] See § 502 of the Act, 21 U. S. C. A. § 352.

[8] See § 304 of the Act, 21 U. S. C. A. § 334.

[9] United States v. One Article of Device Labeled Spectro-Chrome, supra.

[10] United States v. 935 Cases of Tomato Puree, 6 Cir., 136 F. 2d 523; United States v. 62 Packages of Marmola Prescription Tablets, D. C. W. D. Mo., 48 F. Supp. 878, affirmed in 142 F. 2d 107; United States v. Two Bags of Poppy Seeds, 6 Cir., 147 F. 2d 123. See, also, Hipolite Egg Co. v. United States, 220 U. S. 45; McDermott v. Wisconsin, 228 U. S. 115; Seven Cases of Eckman's Alterative v. United States, 239 U. S. 510.

and should be followed. Accordingly, the so-called Spectro-Chrome—the article proceeded against in this case—should be seized and condemned.

"Decree reversed and case remanded for further proceedings in conformity with this opinion."

A petition for certiorari was subsequently filed in the Supreme Court of the United States on behalf of the claimant, and on October 13, 1947, the petition was denied. Thereafter, a petition for an order of seizure was filed by the Government, and on March 15, 1948, the court ordered the device reseized. On March 19, 1948, judgment was entered ordering the condemnation and destruction of the device and its accompanying labeling.

2391. Misbranding of Spectro-Chrome. U. S. v. 1 Device * * * (and 5 other seizure actions). (F. D. C. Nos. 16879, 16900, 16901, 16910, 16915, 16923. Sample Nos. 76872–F, 4061–H, 4175–H, 13743–H, 13887–H, 23316–H.)

LIBELS FILED: On or about July 25, 26, and 30, 1945, Southern District of New York, Northern District of Ohio, Eastern District of Missouri, and District of Delaware.

ALLEGED SHIPMENT: Between the approximate dates of October 13, 1944, and July 9, 1945, from Newfield, N. J., by the Dinshah Spectro-Chrome Institute.

PRODUCT: 6 *Spectro-Chrome* devices at Bronx, N. Y., Cleveland and South Euclid, Ohio, St. Louis County, Mo., and Wilmington, Del. The construction and appearance of each device was essentially the same as the device involved in notices of judgment on drugs and devices, No. 2098.

The devices were accompanied by one or more of the following pieces of printed and graphic matter: "Spectro-Chrome Home Guide," "Favorscope for 1944 [or "1945"]," "Rational Food of Man," "Key to Radiant Health," "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice—Make Your Own Independent Income as Our Introducer," "Spectro-Chrome General Advice Chart for the Service of Mankind — Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome—December 1941—Scarlet," "Spectro-Chrome—August 1944 [or "January 1945"]," "Spectro-Chrome—March 1945—Yellow," "Spectro-Chrome in Every Home," and "Spectro-Chrome Metry Encyclopedia."

NATURE OF CHARGE: Misbranding, Section 502 (a), the labeling of the devices contained false and misleading curative and therapeutic claims in substantially the same respect as the device involved in notices of judgment on drugs and devices, No. 2098.

DISPOSITION: August 24, September 5 and 7, and November 21, 1945. Default decrees of condemnation. The devices were ordered delivered to the Food and Drug Administration, for experimental and investigational purposes and for use in other court cases which were pending or which might be filed in the future.

2392. Misbranding of Spectro-Chrome. U. S. v. 1 Device, etc. (F. D. C. No. 16838. Sample No. 4096–H.)

LIBEL FILED: July 19, 1945, Eastern District of Pennsylvania.

ALLEGED SHIPMENT: On or about May 18, 1945, by Dinshah Spectro-Chrome Institute, from Newfield, N. J.

PRODUCT: 1 *Spectro-Chrome* device at Allentown, Pa. The construction and appearance of the device was essentially the same as the device involved in notices of judgment on drugs and devices, No. 2098. The device was accompanied by the following pieces of printed and graphic matter: "Spectro-Chrome Home Guide," "Favorscope for 1945," "Rational Food of Man," "Key to Radiant Health," "Request for Enrollment as Benefit Student," "Auxiliary Benefit Notice — Make Your Own Independent Income as Our Introducer," "Spectro-Chrome General Advice Chart for the Service of Mankind — Free Guidance Request," "Certificate of Benefit Studentship," "Spectro-Chrome — December 1941 — Scarlet," and "Spectro-Chrome — March 1945 — Yellow."

NATURE OF CHARGE: Misbranding, Section 502 (a), the labeling of the device contained false and misleading curative and therapeutic claims in substantially the same respect as the device involved in notices of judgment on drugs and devices, No. 2098.

DISPOSITION: An answer to the libel was filed on August 10, 1945, by La Rue E. Snyder, Allentown, Pa. Thereafter, exceptions to the answer were filed on